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Alberta Court of Appeal Decides Syncrude not an Employer under Human Rights Legislation

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Cases Considered:

Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director), 2011 ABCA 3

It is perhaps ironic that in a decision where the Human Rights Panel found that there had been no discrimination, one of the respondents used the occasion to appeal the finding that it was an employer under the (then) *Alberta Human Rights, Citizenship and Multiculturalism Act* (currently *Alberta Human Rights Act*, RSA 2000, c A-25-5), and therefore subject to the Act. Since the structure of the "employment" relationship at issue in this case is commonly practiced in Alberta, the Court of Appeal ruling on whether Syncrude was an employer could have a significant impact on Alberta human rights law.

The Panel decision, that of the Court of Queen's Bench and the application to intervene were the subjects of earlier my earlier posts To Employ or Not to Employ: Is That the Question? and What's in a name? Construction Owners Association of Alberta and Construction Labour Relations – An Alberta Association Concerned about "Employer" in the *Alberta Human Rights Act*.

In brief, Donald Luka was denied access to the Syncrude site in Fort McMurray because he failed a drug test. He had been a long-term employee of Lockerbie & Hole when they decided to transfer him to the Syncrude site. Lockerbie & Hole had contracts with general contractor Kellogg, Brown and Root to perform work on the Syncrude site. However, Syncrude had a policy that contractors could not bring workers onto the site unless they passed a drug test. Mr. Luka, who failed the required drug test, was a recreational drug user, but was not disabled by an addiction to drugs. The Panel concluded that he was not discriminated against, and thus, the Panel did not have to consider any defence put forward by Lockerbie & Hole, such as an argument that drug testing is a *bona fide* occupational requirement. The Panel also concluded that Lockerbie & Hole was an employer of Luka because they were in a master and servant relationship. In addition, since "employment" under human rights legislation is not limited to master and servant relationships, it could also include other relationships that involved the "utilization" of services. Because Syncrude was indirectly utilizing the services of Luka through Lockerbie & Hole, the Panel concluded that there was an employment relationship. Thus, Syncrude was properly named as a respondent.

On appeal to the Court of Queen's Bench, Justice T.D. Clackson concluded that the Panel had been in error in concluding that Syncrude was an employer. He held that while "employer" in the human rights context is not necessarily the same as the common-law definition (master and

servant), "it was not wide enough to cover the relationship between the owner of an industrial site, and the employees of arm's length contractors working on the site." In particular, there was no express or implied contractual link between Luka and Syncrude (*Lockerbie,* ABCA, paras. 6 and 24).

The Director of the Alberta Human Rights Commission appealed to the Alberta Court of Appeal, and the Court accepted arguments from three intervenors (Construction Owners Association of Alberta, Construction Labour Relations – an Alberta Association, and the International Brotherhood of Electrical Workers, Union Local 424).

Alberta Court of Appeal Justices Jean Coté, Frans Slatter and Patricia Rowbotham reviewed the meaning of "employment" under the Act. The Act prohibits discrimination in the area of employment on any prohibited ground (e.g., race, colour, gender, and disability). The Court of Appeal noted that "employment" is not defined under the Act, and that the starting point for its meaning is therefore the common-law definition (para. 13). The Court of Appeal also noted that remedial statutes such as the Act require flexible and contextual interpretation (para. 14). Further, case law has recognized that remedial statutes often intend a broader meaning of "employment" than exists at common-law (para. 15). This is in keeping with a number of human rights decisions in which relationships that were not traditional "master and servant" relationships had been found nevertheless to amount to employment under human rights law.

The following are examples of cases in which relationships have been held to be employment relationships under human rights law, largely based on the notion that the respondent exercised "control" over or utilized the services of the complainant:

- A taxi driver-owner and taxi company: *Sharma v Yellow Cab Ltd*. (1983), 4 CHRRD/1432 (BCHRT); *Pannu v Prestige Cab Ltd.* (1986), 47 Alta LR (2d) 56 (CA);
- A regular customer of the complainant's employer and the complainant: *Jalbert v Moore* (1996), 28 CHRR D/349 (BCCHR);
- An actress auditioning for a movie role and a film production company: *Fernandez v MultiSun Movies Ltd.* (1998), 35 CHRR D/43 (BCHRT);
- An applicant for volunteer training and a feminist organization sponsoring the training: *Nixon v Vancouver Rape Relief Society* (2002), 42 CHRR D/1 (BCHRT), reversed on other grounds *Nixon v Vancouver Rape Relief Society*, 2003 BCSC 936, affirmed *Nixon v Vancouver Rape Relief Society (No. 2)* (2005), 42 CHRR D/20 (BCCA), leave to appeal to S.C.C. refused SCC No. 31633 February 1, 2007;
- A live-in caregiver and the brother of the patient: *Milay v Athwal (No. 1)* (2004), 50 CHRR D/386 (BCHRT);
- A police officer (considered at common law to be a public officer rather than an employee): *Re Prue* (1984), 33 Alta LR (2d) 169 (QB);
- An army cadet and Canada's armed forces: *Canada (Attorney General) v Rosen,* [1991] 1 FC 391 (CA);
- A cook hired by a company to cook for its only customer, and the customer: *Fontaine v Canada Pacific Inc.,* [1991] 1 FC 571 (CA)

The Court of Appeal noted that many of the cases in which the relationship was considered to be one of employment were those in which the complainant was self-employed (para. 18). The Court also said that those cases expanding the common-law meaning of employment did not generally involve the circumstances where the complainant was "employed" by two different persons (para. 18).

The Court relied on *British Columbia (Ministry of Health Services) v British Columbia (Emergency Health Services Commission*), 2007 BCSC 460, where an ambulance paramedic was held to be employed by the Emergency Health Services Commission but not co-employed by the British Columbia Government. The relationship between the paramedic and the government was "too remote to fall within the concept of 'employment'" (para 18).

The Court of Appeal noted that where the complainant potentially has two employers, it will be "rare that the concept ["employment"] can be extended so far as to encompass employment by two different parties in [these] circumstances" (para. 21). The Court of Appeal also noted that the Court of Queen's Bench had concluded that there must be an express or implied contractual link between the complainant and the entity alleged to be the employer. The Court of Appeal stated that requiring a contractual link would exclude many relationships that had been previously included as "employment" under human rights law. Nevertheless, the Court held that the presence or absence of a direct contractual link is "a significant factor" (para. 24). Also of significance is whether the alleged employer benefits from or utilizes the services of the complainant "with a significantly close nexus, although mere benefit is not sufficient" (para. 24).

The Court of Appeal set out a list of factors which must be taken into consideration when determining whether a particular relationship qualifies as "employment" under the Act. Although the Court does not specifically state where these factors originate, it appears that they are derived from a survey of relevant cases (para. 25):

- whether there is another more obvious employer involved;
- the source of the employee's remuneration, and where the financial burden falls;
- normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips;
- who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
- who has the direct benefit of, or directly utilizes the employee's services;
- the extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
- the perceptions of the parties as to who was the employer;
- whether the arrangement has deliberately been structured to avoid statutory responsibilities.

Where it is alleged there is more than one co-employer, the following factors are also relevant:

- the nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
- the independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- the nature of the arrangement between the primary employer and the co-employer,
- for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
- the extent to which the co-employer directs the performance of the work.

Other factors may be relevant in particular cases.

The Court of Appeal concluded that while Luka was clearly an employee of Lockerbie & Hole, he had no contractual relationship with Syncrude, he was not part of the organization, nor did he report to Syncrude, and Syncrude did not direct his work. Thus, his relationship with Syncrude was too remote to justify a finding of employment, even under an extended meaning given to "employment" under human rights law (para. 26). Thus, the burden of protecting Luka's human rights under the Act fell on Lockerbie & Hole (para. 26).

The Court also determined that Syncrude was a private property owner and that human rights law does not extend to access to private property under the Act (para 27).

Finally, because this was a situation involving potentially multiple employers in the chain (Syncrude, Kellogg Brown and Root, Marsulex and Lockerbie & Hole), the Legislature could not have intended that all of those parties be considered "employers" for the purpose of the Act (para. 28). It is, however, important to note that the complaint did not bring the other contractors in the chain into the action; the named respondents were the immediate employer and the company (Syncrude) that had the drug testing policy. It is therefore not clear that this "chain" concern would actually translate into reality.

While the reasoning in this case may be seen as logical, I wonder about the implications if the basis of discrimination had not been drug testing and disability (with the safety concerns being quite important), but another ground. What if Syncrude had a policy that persons who worked on its site could not be female? This would mean that if Lockerbie & Hole decided it needed the business and thereby implemented the policy, it would then be discriminating against their female employees. Could they then argue the defence of *bona fide* occupational requirement? Could they say that it would be undue hardship because they would lose a lucrative contract by refusing to abide by the policy?

The Court of Appeal noted that the Panel had been concerned that Syncrude had "downloaded" its policy on the contractors. Thus, there would potentially be no remedy if Syncrude (a landowner) excluded persons from private property based on a discriminatory policy. The Court of Appeal noted that human rights law does not extend to private property owners (unless they are employers, landlords or service providers), and that the burden of protecting the employees was on Lockerbie & Hole. However, as noted above, it is not entirely clear that Lockerbie & Hole would necessarily provide human rights protection if it came at the cost of undue hardship.

In the end, it appears that the flexible interpretation doctrine may have given way to an overly legalistic interpretation that was more concerned with the possibility of multiple entities being subject to human rights laws than with providing the employee with protection from discrimination.